

**UNITED STATES DEPARTMENT OF LABOR  
BOARD OF ALIEN LABOR CERTIFICATION APPEALS  
800 K STREET, NW  
WASHINGTON, DC 20001-8002**

Date: 09/25/96

Case No. 95-INA-50

In the Matter of:

Cine Video Corporation  
Employer,

on behalf of

Barbara Palmer  
Alien.

Before: Guill, Vittone and Wood  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from an employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. 656.27(C).

**Statement of the Case**

On March 15, 1993, Cine Video Corporation, Employer, filed an application for alien employment certification to enable Barbara Palmer, Alien, to fill the position of Prosthesis Special Effects make-up Artist at a salary of \$60,000 per year. The duties of the job were described as follows:

To design and execute prosthetic special effects make-up for feature film projects, and design hair pieces. This includes animatronics and puppet pieces for special effects for films. Design facial and body prosthetic for actors, take impression of faces, bodies and teeth to create new characters for television and feature film productions. Create duplications of peoples faces and bodies sculpt new faces and body parts. Mix fine latex in temperature controlled room and inject into molds. Bake molds, airbrush color, feed information into computer for continuity for projects.

Employer required that applicants have twelve years of education and five years of experience in the job offered. In addition, applicants were required to have both film and video experience and have animatronics and puppeting (in film) experience. (AF. 41)

The CO issued a Notice of Findings (NOF) proposing to deny certification on February 23, 1994. (AF. 34-39) The CO stated that it does not appear that Employer recruited U.S. applicant Mark Tavares in good faith or rejected him for lawful job-related reasons. Employer was instructed to submit documentation of Employer's efforts to establish direct contact with applicant Tavares and interview him in a timely manner; submit documentation of the means used to contact the applicant; and document the lawful job-related reasons for rejecting the applicant.

The CO further stated that it does not appear that Employer is offering its minimum job requirements to U.S. applicants because the Alien has not documented five years of experience in performing the job duties. Employer was instructed to document why it is not feasible to hire anyone with less than the required experience or document that the Alien obtained the required experience with an employer other than the petitioner.

The CO also stated that the offered job does not appear to be a full-time position; that the inherent nature of film projects is that they are not permanent. The CO stated that at different times Employer has represented the nature of his business to be motion picture studio, to sell rental and provisions of both technical services and equipment for the motion picture industry, and rental motion picture equipment. The CO stated that the Alien's work experience has been short-term (1-2 months) and characterized by breaks between projects; that this is not full-time permanent work; nor is there a job opportunity clearly open to a U.S. worker. 20 CFR 656.20(c)(8) Employer was instructed to provide a detailed and substantiated business plan documenting that the offered job is a full-time position and document that Employer has previously filled the position on a full-time permanent basis.

Employer, by counsel, submitted rebuttal on April 1, 1994. (AF. 19-33) Counsel stated that applicant Tavares was rejected for lawful job-related reasons; that he has been in the business since late 1989 and his experience is not extensive; that he is not skilled in prosthetic special effects and does not have the experience required for this job.

Counsel further stated that Employer recruited in good faith and that delays in the recruitment process were caused by Mr. Tavares. Counsel stated that Employer and Mr. Tavares

conversed on a first name basis and had a comfortable working relationship during recruitment.

Counsel stated that the Alien has been engaged in the business of make-up and prosthetic for over ten years; that she is an internationally known make-up artist who possesses greater qualifications than required for the job.

Counsel stated that Employer is a major supplier of equipment and material to the movie industry; that renting and leasing equipment is its primary activity. Counsel stated further that Employer engages in frequent in-house production activities and is a renter of motion picture equipment. Counsel stated that Employer is offering the Alien permanent full-time employment; that the Alien, as a prosthetic special effects make-up artist, will consult the company on its new line of make-up prosthetics and special effects machinery and equipment, including the Alien's new line and style of prosthetic equipment. Counsel also stated that the Alien will provide managerial and technical consultation in the design of facial and body prosthetics for clients in the motion picture business and will teach her techniques to others.

Attached to rebuttal was a fax from Mr. Tavares explaining the delay in transmitting his resume to Employer and a copy of his faxed resume (AF. 24-26), a letter attesting to a portion of the Alien's prior experience and abilities from Mr. Nimoy, the Alien's resume (AF. 28-31) and a letter from Employer's president to the CO (AF. 32-33) wherein the president explained the reasons for hiring the Alien and detailed her experience. He also stated that "[w]e seek to hire Ms. Palmer for a temporary period of one year to begin immediately upon the receipt of the appropriate work permission, she will be compensated at a base salary of \$65,000.00 per year, ..." (AF. 33) He further stated that Employer wants to market the Alien's line of prosthetic equipment and must hire her to provide the consulting expertise.

The CO issued a final determination denying certification on May 2, 1994. (AF. 11-18) The CO stated that Mr. Tavares responded to the CO's questionnaire by stating he has experience in the job duties going back to 1988, but that he omitted this earlier experience from his resume because the films were embarrassing. The CO stated that rebuttal contained no convincing evidence that the Employer established timely contact with Mr. Tavares and diligently explored his background; that the rejection of Mr. Tavares on the basis that he lacks five years of experience indicates a lack of good faith recruitment; that Employer has not provided lawful job-related reasons for rejecting him. 20 CFR 656.21(b)(6)

The CO determined that the rebuttal documentation does not convincingly establish that the Alien has five years of experience performing the duties of the offered job; that the statements made by counsel are not supported by statements of a person with knowledge of the facts, that the Alien's resume is not from a neutral and disinterested party and the letter from Mr. Nimoy does not document five years of experience. Accordingly, the CO determined that Employer had failed to establish that it is offering its minimum job requirements to U.S. workers. 20 CFR 656.21(b)(5)

The CO also determined that Employer is not offering permanent full-time employment;

that the various statements of the nature of his business are contradictory; that EDD's records indicate that Employer is engaged in the business of renting motion picture equipment and not actually engaged in the business of a motion picture studio. The CO stated that in an effort to describe full-time employment, Counsel identified job duties that the Alien would perform which are not duties of the offered job and that a detailed and substantiated business plan was not submitted with rebuttal.

Employer filed a request for administrative-judicial review on June 9, 1994. (AF. 1-10)

### DISCUSSION

The issues are whether Employer job offer is for full-time employment; whether Employer recruited U.S. workers in good faith; whether Employer rejected a U.S. worker for lawful job-related reasons; and whether Employer is offering its minimum requirements for the job to U.S. workers.

According to 20 CFR 656.3, employment means permanent full-time work by an employee for an employer other than oneself. The Employer bears the burden of proving that the job is permanent and full-time. If the Employer's own evidence does not show that the position is permanent and full-time, certification can be denied. Gerata Systems America, Inc., 88-INA-344 (Dec. 16, 1988). The letter from Employer's president to the CO clearly states that Employer is offering a temporary job to the Alien for a period of one year. (AF. 33) While this evidence is contrary to the statements of counsel, it is afforded greater weight because this description of the job was made by a person who has knowledge of the underlying facts. Paragon Imports Corporation, 91-INA-319 (Feb. 4, 1993). We rely on the president's description of the job offer and conclude that Employer is not offering permanent full-time employment. Accordingly, certification was properly denied on this basis.

We note that despite counsel's contentions, the evidence does not establish that the Alien has five years of experience in the job offered. Her resume lists a number of work projects, but offers no dates of employment. Mr. Nimoy's letter attests to her work on one film; but again provides no dates of employment. The letter from Employer's president wherein he states that the Alien has 18 years of motion picture experience does not specify dates of employment. As such we afforded it little weight. Since Employer has not shown that the Alien has five years of experience, Employer failed to establish that it is offering its minimum requirements for this job to U.S. workers. 20 CFR 656.21(b)(5); ERF Inc. d/b/a Bayside Motor Inn, 89-INA-105 (Feb. 14, 1990) Certification was properly denied on this basis also.

We note also that the record is filled with inconsistencies which tend to raise questions of credibility. For instance: Employer has stated at least three different descriptions of the nature of its business activities; Employer attested in the labor certification application that the job is full-time at a salary of \$60,000.00 per year, but stated in a letter to the CO that the job is temporary at a salary of \$65,000.00 per year; and Employer attested to the duties of the job in the labor

certification application, whereas counsel provided a statement of different job duties in rebuttal.

We conclude, on the basis of the issues discussed, that certification was properly denied.

ORDER

The denial of labor certification is AFFIRMED.

**Entered at the Direction of the panel by:**

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Todd R. Smyth  
Secretary to the Board of Alien Labor  
Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

